(3)
Supreme Court, U.S.
FILED
031701 JUN 23 2004

No. _____

IN THE

Supreme Court of the United States

RODNEY LEROY CRAIG,

Petitioner,

—v.—

TAMIKA HOLSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

JAMES T. BUDD
Counsel of Record
MABRY & MCCLELLAND LLP
2200 Century Parkway, N.E.
10th Floor
Atlanta, Georgia 30345
(404) 325-4800

Counsel for Petitioner

QUESTION PRESENTED

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), this Court held that although States possess broad discretion with respect to punitive damages, grossly excessive punitive damages awards violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because they further no legitimate purpose and constitute an arbitrary deprivation of property. The question presented is:

Whether a punitive damages award is unconstitutionally excessive under *State Farm* and *Gore*, when:

a. the award is over 22 times the plaintiff's compensatory damages;

b. the court below analyzed the constitutionality of the award by comparing it to hypothetical compensatory damages, rather than the plaintiff's actual compensatory damages;

c. the court below based its analysis on a Supreme Court of Georgia case that was decided prior to *Gore* and rejects "the notion that punitive damages must necessarily bear some relationship to the actual damages awarded by the jury;" and

d. the court below relied on dissimilar conduct on the part of the tortfeasor to justify the award.

PARTIES TO THE PROCEEDING

Rodney Leroy Craig and Tamika Holsey.

RULE 29.6 STATEMENT

No corporation is a party to this action. Petitioner Craig is insured by Infinity Insurance Company.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	6
THE GEORGIA COURT OF APPEALS' RULING UPHOLDING THE PUNITIVE DAMAGES AWARD DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *GORE* AND *STATE FARM*	7
A. The Punitive Damages Award Is Presumptively Unconstitutional Because Of The 22.7-to-1 Ratio Of Punitive to Compensatory Damages	7

PAGE

B. The Georgia Court Of Appeals' Comparison Of The Punitive Damages Award To Hypothetical Compensatory Damages, Rather Than The Plaintiff's Actual Compensatory Damages, Conflicts With *State Farm*..... 9

C. The Georgia Court Of Appeals' Justification Of The Punitive Damages Award By Reference To Dissimilar Conduct On The Part Of The Tortfeasor Conflicts With *State Farm* .. 12

CONCLUSION 15

APPENDIX

Supreme Court of Georgia's Denial of Certiorari 1a

Court of Appeals of Georgia's Opinion 2a

TABLE OF AUTHORITIES

Cases: PAGE

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Bolsta v. Johnson, No. 2003-004, 2004 WL 444649 (Vt. Mar. 4, 2004)..... 14

Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2004 WL 869188 (Utah Apr. 23, 2004)..... 8, 9

Hospital Auth. of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991).....5, 10, 11

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, (1991) 8, 11, 12

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, (1993)..... 12

Willet v. Stookey, P.C., 568 S.E.2d 520 (Ga. Ct. App. 2002)..... 2

Constitution, Statutes, and Regulations:

U. S. Const. amend. XIV, § 1..... 1

28 U.S.C. § 1257(a)..... 1

Ga. Code Ann. § 40-6-49 1

Ga. Code Ann. § 40-6-270(a) 1

Ga. Code Ann. § 40-6-391(a) 1, 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodney Leroy Craig respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of Georgia in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals of Georgia (App., infra, 2a) is reported at 590 S.E.2d 742. The order of the Supreme Court of Georgia denying certiorari (App., infra, 1a) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Supreme Court of Georgia denied discretionary review in this case on March 29, 2004.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

On August 9, 1998, at approximately 1:44 a.m., Rodney Leroy Craig was involved in an automobile accident with Tamika Holsey. Craig was driving under the influence at the time of the accident and he was cited for, and pled guilty to charges of following too closely (Ga. Code Ann. § 40-6-49), leaving the scene of an accident involving injury (Ga. Code Ann. § 40-6-270(a)), and driving

under the influence, first offense (Ga. Code Ann. § 40-6-391(a)). As a result of the accident, Holsey suffered minor neck and back injuries that substantially resolved prior to trial.

On June 1, 2000, Holsey filed a Complaint against Craig for her personal injuries arising from the accident. The case then proceeded to trial on March 12th and 13th, 2002. Because punitive damages were sought, the trial was bifurcated as mandated under Georgia law. Prior to the commencement of trial, Craig objected through a Motion in Limine to the introduction of any evidence or comment on his criminal record beyond the use of a certified copy of his conviction for impeachment purposes.[1] Craig also moved in limine to preclude any evidence of his drug or alcohol use on occasions other than the night of the accident.

Nevertheless, Holsey mounted an attack on Craig at trial for conduct unrelated to the accident; including his prior conviction for drug possession and his use of marijuana prior to and following the day of the accident. During the first portion of the bifurcated trial, the trial court permitted Holsey's attorney to question Craig and to read from his deposition regarding his prior and subsequent drug and alcohol use over the continuing objections of his attorney. As a result, evidence that Craig was an occasional marijuana user and that he used marijuana subsequent to the day of the accident was admitted over the objections of his attorney.

During the punitive damages phase of the trial, the trial court again allowed Holsey's attorney, over objec-

---

[1] Georgia law provides that a witness may be impeached by introducing a certified copy of a conviction of a crime involving moral turpitude, but the facts surrounding the conviction are not admissible unless the witness attempts to rehabilitate their character by explaining the circumstances of the conviction. *Willet v. Stookey, P.C.*, 568 S.E.2d 520 (Ga. Ct. App. 2002).

tion, to read into evidence even more of Craig's deposition testimony regarding drug use on occasions other than the night of the accident. The trial court further allowed Holsey's attorney to question Craig regarding marijuana use subsequent to the accident.

The trial court also permitted Holsey's attorney to question Craig and read portions of his deposition transcript pertaining to the details of his prior felony conviction for possession of a controlled substance in Arkansas. Craig's arrest for possession of a controlled substance occurred on October 20, 1996, nearly two years prior to Craig's accident with Holsey. Specifically, Holsey's attorney read from Craig's deposition transcript regarding the details of his prior felony conviction and the fact that the controlled substance was crack cocaine. Holsey's attorney was also permitted, over objection, to question Craig regarding the details of this conviction and his intent to use crack cocaine.

This culminated in Holsey's attorney being allowed to argue to the jury that they should award punitive damages based upon all of Craig's conduct, much of which was unrelated to the accident with Holsey and had occurred years before the accident. In addition to recounting all of this prejudicial evidence to the jury, Holsey's attorney argued the following to the jury: "And I can't tell you, and don't profess to tell you how much punitive damages you should award in this case. But I tell you that its unlimited, the amount."

Following the introduction of this inadmissable and prejudicial evidence and Holsey's attorney's argument, the jury returned a verdict and judgment against Craig in the amount of only $8,801.40 in actual and compensatory damages. The award of a small amount of actual and compensatory damages is conclusive proof of the very limited scope of Holsey's loss.

In stark contrast to these damages, the jury awarded Holsey $200,000.00 in punitive damages. Therefore, the punitive damages award was 22.7 times greater than the compensatory award. Craig moved the trial court for a new trial, but the motion was denied.

Craig then appealed to the Georgia Court of Appeals. Between the trial and the decision by the Court of Appeals, this Court decided *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003). One of Craig's arguments on appeal was that the punitive damages award was so grossly excessive that it violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. However, the Georgia Court of Appeals affirmed and upheld the $200,000.00 punitive damages award.

In so doing, the court below rejected Craig's claim that the evidence introduced at trial had unduly prejudiced him and resulted in a punitive award that punished him for conduct that was unrelated to the traffic accident with Holsey. The court below further rejected Craig's claim that the punitive damages award was grossly excessive and thus, unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In a full bench decision with one dissent, the Court of Appeals justified the 22.7-to-1 ratio of punitive to compensatory damages by hypothesizing that Holsey could have died as a result of the accident. The court below then compared the punitive damages award to hypothetical wrongful death compensatory damages awards even though Holsey was not only alive and had recovered, but had suffered less than $9,000.00 in actual and compensatory damages. The Court of Appeals reasoned that "[i]n Georgia, awards for wrongful death can easily approach or exceed the amount of punitive damages

awarded in the present case." *Craig v. Holsey*, 590 S.E.2d 742, 748 (Ga. Ct. App. 2003); App., infra, 10a. Indeed, the Court of Appeals never discussed *State Farm's* recognition that "few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

In support of its comparison of hypothetical compensatory damages to the actual punitive damages award, the court below cited to a single Georgia Supreme Court case, *Hospital Auth. of Gwinnett County v. Jones*, 409 S.E.2d 501 (Ga. 1991), which was decided prior to *Gore* and explicitly "rejected the notion that punitive damages must bear some relationship to the *actual* damages awarded by the jury." *Id.* at 503. Thus, the court below never compared the punitive damages award to the actual compensatory damages.

Furthermore, the court below conceded that Georgia law provides for only modest penalties for Craig's specific crimes, which penalties were dwarfed by the $200,000.00 punitive damages award. The court below, ignored this important factor by stating that the third *Gore* guidepost is "less important than the first two." [2] *Craig*, 590 S.E.2d at 748; App., infra, 11a.

Despite the fact that it never applied the second *Gore* guidepost and that the third guidepost was not satisfied, the court below concluded that the punitive damages award was not grossly excessive so as to be unconstitu-

---

[2] Georgia law provides that the criminal penalty for a first offense of leaving the scene of an accident involving injury is a fine that cannot exceed $1,000. Ga. Code Ann. § 40-6-270(a). The monetary criminal penalty for a first offense of driving under the influence is a fine that cannot exceed $1,000. Ga. Code Ann. § 40-6-391(C)(1)(a).

tional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.*

Presiding Judge Andrews dissented, stating that:

> the majority seeks to negate the disparity between the two awards by leaping to the conclusion that Holsey could have died in this accident and cites to compensatory damages in wrongful death cases as analogous to the potential damages in this case . . . this analogy is not helpful and the majority cites to no authority on point which would support this assumption.

Craig, 590 S.E.2d at 749; App., infra, 13a (Andrews, P.J., concurring in part and dissenting in part). Therefore, Presiding Judge Andrews concluded that "[i]n this case, of the three guideposts set out by *Gore*, the last two are not met, and only two of the five factors to be considered are present in the first one. Accordingly, the punitive damages awarded in this case were excessive and the judgment should be reversed." *Craig*, 590 S.E.2d at 749-750; App., infra, 14a.

REASONS FOR GRANTING THE PETITION

This Court should grant plenary review because the reasoning of the Court of Appeals in affirming the punitive damages award is in direct conflict with this Court's decisions in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996). Furthermore, the erroneous decision of the Georgia Court of Appeals highlights a split between those courts that have properly applied *State Farm* and *Gore* and those that have not.

Here, the court below affirmed the punitive damages award even though only two of the five factors to be considered under the first *Gore* guidepost were satisfied, the second *Gore* guidepost was never applied, and the third guidepost was not met. In affirming the punitive damages award, the court below relied on a Georgia Supreme Court case that was decided prior to *Gore* and explicitly rejected the notion that punitive damages must bear some relationship to the actual compensatory damages. Accordingly, the punitive damages award in this case was grossly excessive and cannot withstand constitutional scrutiny. In the alternative, and at a minimum, this case must be vacated and remanded so that the punitive damages award can be compared to the actual compensatory damages awarded per *Gore* and *State Farm*.

THE GEORGIA COURT OF APPEALS' RULING UPHOLDING THE PUNITIVE DAMAGES AWARD DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *GORE* AND *STATE FARM*

A. The Punitive Damages Award Is Presumptively Unconstitutional Because Of The 22.7-to-1 Ratio Of Punitive To Compensatory Damages

This Court's decision in *State Farm* makes clear that the 22.7-to-1 ratio of punitive to compensatory damages in this case is unconstitutionally excessive. Although this Court has been "reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," this Court's "jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single digit ratio between punitive

and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 424-425. In fact, this Court has on multiple occasions stressed that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* at 425; *Gore*, 517 U.S. at 581; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S.Ct. 1032 (1991).

This conclusion was based, in part, on over 700 years of legislative history providing for double, treble, or quadruple damages to punish and deter. *State Farm*, 538 U.S. at 425 (citing to *Gore*, 517 U.S. at 581 and n.33). Accordingly, this Court has held that "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution." *State Farm*, 538 U.S. at 425.

The ratio in this case does not come close to the single-digit ratios that have traditionally satisfied due process. Instead, the plaintiff was awarded punitive damages that were over twenty-two times the amount of compensatory damages. Thus, the court below did not ensure that the measure of punishment was both reasonable and proportionate to the amount of harm to the plaintiff as is required by *State Farm*. *Id.* Indeed, as is discussed below, the Court of Appeals never compared the actual compensatory damages to the punitive damages awarded as is required by *Gore*.

The Court of Appeals' failure to comply with *Gore* and *State Farm* also illustrates the inconsistent application by different state courts of this Court's decisions on the issue of punitive damages. A comparison of the Court of Appeals' decision here with the Supreme Court of Utah's recent decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 WL 869188 (Utah Apr. 23, 2004), demonstrates how state courts have varied

widely in the application of *Gore* and *State Farm*. In *Campbell*, the Supreme Court of Utah noted that this Court "strongly implied" that single digit ratios mark the outer limits of due process. *Id.* at *9. Accordingly, the Court held that a 9-to-1 ratio between compensatory and punitive damages served Utah's legitimate goals of deterrence and retribution within the limits of due process and thus, reduced the punitive damages award from $145 million to $9,018,780.75. *Id.* at ** 10, 12.

The reasoning and holding of the Utah Supreme Court demonstrates that it will likely invalidate any punitive award exceeding a 9-to-1 ratio. Conversely, the Georgia Court of Appeals has signaled that a 22.7-to-1 ratio is permissible in the State of Georgia and that a comparison of the punitive damages award with the actual compensatory damages award is unnecessary. The inconsistent application of *Gore* and *State Farm* by Georgia and Utah appellate courts evidences a split among state courts which necessitates this court granting certiorari in this case.

The Court of Appeals of Georgia's decision in this case does not comply with *Gore* and *State Farm* and it is inconsistent with the application of these decisions by other courts. Thus, this petition and plenary review should be granted.

B. The Georgia Court Of Appeals' Comparison Of The Punitive Damages Award To Hypothetical Compensatory Damages, Rather Than The Plaintiff's Actual Compensatory Damages, Conflicts With *State Farm*

The court below never articulated how the 22.7-to-1 ratio of punitive damages to compensatory damages in this case comported with due process, because it never applied the second *Gore* guidepost. At no point did the

court below compare the actual compensatory damages to the punitive damages award as is required by the second *Gore* guidepost, nor did it address this Court's recognition that "few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

Instead, the court below improperly justified the punitive damages award by hypothesizing that the plaintiff could have died as a result of the accident. The court then compared hypothetical damages awards in wrongful death cases to the actual punitive damages awarded to determine that there was no disparity between the two awards. *Craig v. Holsey*, 590 S.E.2d 742, 748 (Ga. Ct. App. 2003); App., infra, 10a.

Such a comparison is in direct conflict with *Gore* and its progeny because the court below never applied the second *Gore* guidepost. Furthermore, the Court of Appeals' analysis renders the second *Gore* guidepost a nullity because courts could always negate an impermissible disparity between compensatory and punitive awards by leaping to the conclusion that the plaintiff's injury and resulting compensatory damages could have been worse. If courts are allowed to compare hypothetical compensatory damages to punitive damages awards, there will never be a disparity between the two awards. Just as due process does not permit courts to adjudicate the merits of hypothetical claims under the *Gore* reprehensibility guidepost, the comparison of hypothetical compensatory damages to punitive damages under the second *Gore* guidepost also violates due process. *State Farm*, 538 U.S. at 423.

The only authority that the court below cited in support of its comparison of hypothetical compensatory damages to punitive damages is *Hosp. Auth. of Gwinnett*

County v. Jones, 409 S.E.2d 501 (Ga. 1991). In *Jones*, the Georgia Supreme Court "rejected the notion that punitive damages must necessarily bear some relationship to the *actual* damages awarded by the jury." *Jones*, 409 S.E.2d at 503. The Georgia Supreme Court justified this conclusion by reasoning that "[w]hile the Supreme Court in *Haslip* analyzed the punitive damages award by comparing it to the actual award, nothing in the opinion mandates such a comparison." *Id.*

Here, the plaintiff was not killed nor was she seriously injured as a result of the accident. Instead, she suffered back and neck strain that had substantially resolved prior to trial. As Presiding Judge Andrews recognized in his dissent, "this was not a potentially fatal accident nor [was] it a potential wrongful death case." *Craig*, 590 S.E.2d at 749; App., infra, 14a (Andrews, P.J., concurring in part and dissenting in part). Therefore, Presiding Judge Andrews correctly concluded that the Court of Appeals sought to negate the disparity between the awards with its hypothetical damages analysis and that such analysis conflicts with the *State Farm* opinion. *Craig*, 590 S.E.2d at 749; App., infra, 13a.

If the Court of Appeals' reasoning were to stand, no Georgia punitive damages award could ever violate the second *Gore* guidepost. Such a conclusion would impermissibly render the second *Gore* guidepost a nullity and allow unconstitutionally excessive punitive damages awards to be affirmed. Yet based upon the Court of Appeals' decision in this case and the Georgia Supreme Court's decision in *Jones*, the current state of the law in Georgia is that punitive damages do not have to bear any relationship to the actual compensatory damages awarded by the jury. This stands in direct conflict with this Court's decisions on punitive damages awards and its clear mandate.

Indeed, the apparent flaw in the Court of Appeals' comparison of hypothetical damages to the punitive award is confirmed by the second *Gore* guidepost, which is the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. *Gore*, 517 U.S. at 580. In *Gore*, this Court confirmed that "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree" and "both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant." *Id.* at 580-581 (citing to *Haslip*, 499 U.S. at 23-24 and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460, 113 S.Ct. 2711 (1993)). Furthermore, due process requires a comparison of the punitive damages award to the actual compensatory damages not a comparison to hypothetical compensatory damages. *State Farm*, 538 U.S. at 423 (holding that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis").

The reasoning of the court below is in direct conflict with this Court's mandate, most recently articulated in *State Farm*. Accordingly, this petition and plenary review should be granted.

C. The Georgia Court Of Appeals' Justification Of The Punitive Damages Award By Reference To Dissimilar Conduct On The Part Of The Tortfeasor Conflicts With *State Farm*

In affirming the punitive damages award, the court below relied upon evidence that Craig had smoked marijuana prior to and after the day of the accident. The court below further considered the details surrounding

Craig's arrest in 1996 and subsequent conviction for possession of a controlled substance in Arkansas. *State Farm* makes clear that such an analysis is invalid. In *State Farm*, this Court confirmed that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *State Farm*, 538 U.S. at 422. Accordingly, this Court concluded that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423.

Yet in this case, Craig was punished for dissimilar acts when the jury considered evidence of his drug and alcohol use on occasions other than on the day of the accident and his previous conviction for possession of a controlled substance. The introduction of this evidence was then affirmed by the court below. Although the degree of reprehensibility of a defendant's conduct is the most important indicium of the reasonableness of a punitive damages award, the court below impermissibly bolstered its reprehensibility conclusion by considering evidence of dissimilar acts. It was the act of driving while under the influence, not the use of marijuana independent of operating a vehicle or Craig's conviction for possession of a controlled substance, which arguably caused the accident and injured the plaintiff. Presiding Judge Andrews, in his dissent, recognized that "this was an isolated incident" and that "Craig had no previous arrests for DUI." *Craig*, 590 S.E.2d at 749; App., infra, 13a (Andrews, P.J., concurring in part and dissenting in part). As in *State Farm*, there is scant evidence here of repeated misconduct of the sort that injured the plaintiff. *State Farm*, 538 U.S. at 423.

Accordingly, this case was impermissibly used as a platform to expose and punish Craig for his unsavory behavior unrelated to the accident in question. *Id.* at 420.

To base the punitive damages award on Craig's dissimilar acts to any degree creates the possibility that he will be punished multiple times for the same conduct. Such a result violates due process and renders the punitive damages award unconstitutional. *Id.* at 423 (citing to *Gore*, 517 U.S. at 593 (Breyer, J. concurring)).

Indeed, of the five factors pertaining to the reprehensibility of a defendant's conduct, only two were present in this case. Admittedly, Craig caused physical harm to the plaintiff and his conduct evinced an indifference to or a reckless disregard of the safety of others. But the plaintiff was not financially vulnerable, Craig's conduct was an isolated incident, and the harm was not the result of intentional malice, trickery, or deceit; instead it was a mere accident.

The Court of Appeals' holding that Craig's conduct was sufficiently reprehensible to warrant punitive damages stands in sharp contrast to the Vermont Supreme Court's recent decision in *Bolsta v. Johnson*, No. 2003-004, 2004 WL 444649 (Vt. March 4, 2004). In *Bolsta*, the defendant, who had a suspended license from a prior DUI conviction, caused a traffic accident while having a blood alcohol content of 0.156. Yet the Court held that the defendant's conduct, which it characterized as negligent or reckless, was insufficient to support a finding of actual malice as is required for the imposition of punitive damages.

Here, Craig caused an accident while driving under the influence, but unlike the defendant in *Bolsta*, he did not have a history of driving while under the influence nor was his license suspended from a prior DUI conviction. Nevertheless, the Court in *Bolsta* determined that the defendant could not be subjected to punitive damages while the Georgia Court of Appeals in this case concluded that Craig's conduct was sufficiently repre-

hensible to warrant a punitive damages award that was 22.7 times the amount of compensatory damages. Such inconsistent determinations of what conduct is sufficiently reprehensible to warrant punitive damages evidences a split among state courts necessitating a review by this Court.

CONCLUSION

As Presiding Judge Andrews explained in his dissent: "[i]n this case, of the three guideposts set out by *Gore*, the last two are not met, and only two of the five factors to be considered are present in the first one. Accordingly, the punitive damages awarded in this case were excessive and the judgment should be reversed." *Craig*, 590 S.E.2d at 749; App., infra, 14a (Andrews, P.J., concurring in part and dissenting in part). The decision of the Georgia Court of Appeals in this case directly conflicts with this Court's decisions in *Gore* and *State Farm* and the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES T. BUDD
Counsel of Record
MABRY & MCCLELLAND LLP
2200 Century Parkway, N.E.
10th Floor
Atlanta, Georgia 30345
(404) 325-4800

Counsel for Petitioner

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: March 29, 2004

Brian W. Sprinkle
MABRY & MCCLELLAND
10th Floor
2200 Century Parkway
Atlanta, GA 30345

Case No. S04C0603

RODNEY LEROY CRAIG v. TAMIKA HOLSEY

COURT OF APPEALS CASE NO. A03A1644

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk

WHOLE COURT

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 14, 2000) http://www.appeals.courts.state.ga.us/rules.html

November 25, 2003

IN THE COURT OF APPEALS OF GEORGIA

A03A1644. Craig v. Holsey. AD-074

ADAMS, Judge.

Rodney Leroy Craig appeals a verdict and judgment against him arising out of a car accident he caused while under the influence of drugs and alcohol. He contends the trial court failed to enforce a settlement agreement, that the court made two evidentiary errors, and that the award of punitive damages was unconstitutional.

Construed in favor of the verdict, the facts show that on August 9, 1998, while he was on probation, Craig smoked two marijuana cigarettes, drank six beers and eight ounces of straight gin, then crashed his car into the back of a car driven by Tamika Holsey, pushing her car into the lane of oncoming traffic. Craig also fled the scene. Craig's blood-alcohol level was 0.169 three hours after the accident. He eventually pled guilty to leaving the scene of an accident, following too closely, and driving under the influence. His sentence included 30 months of probation. Holsey sustained injuries in the accident. Following trial, the jury returned a verdict of $8,801.40 in actual and compensatory damages and, following a separate hearing, $200,000 in punitive damages.

1. We first address whether Craig filed a timely notice of appeal.

Judgment was entered on March 15, 2002. On April 8, Craig filed a timely motion for new trial, but the trial court dismissed the motion as void on September 5, 2002, because of Craig's failure to obtain or serve a rule nisi, as required by OCGA § 5-5-44. On September 11, 2002, Craig filed a notice of appeal from the verdict and judgment and the September 5 order dismissing his motion for new trial. Holsey has now filed a motion to dismiss the appeal, contending that this Court does not have jurisdiction to consider it because a void motion for new trial does not extend the time for filing a notice of appeal.

Craig's motion for new trial was void. OCGA § 5-5-44 provides that "[i]n all motions for a new trial the opposite party shall be served with a copy of the rule nisi unless such copy is waived." Failure to perfect service of the motion for new trial in accordance with OCGA § 5-5-44 renders the motion was void. See *Dunn v. Dunn*, 221 Ga. 368, 369 (1) (144 SE2d 758) (1965).[1]

It is true that a motion for new trial that is void because it was not timely filed does not extend the time for filing the notice of appeal. *Porter v. State*, 271 Ga. 498, 498-499 (521 SE2d 566) (1999); *Wright v. Rhodes*, 198 Ga. App. 269 (401 SE2d 35) (1990). It appears, however, that in other cases, including failure to serve a rule nisi, a timely-filed motion for new trial that is dis-

---

[1] The Supreme Court has held that "[t]he failure to attach a rule nisi to a motion for new trial does not demand a dismissal of the motion. The trial judge in his discretion may dismiss it or continue the matter until the motion is perfected." *Stoner v. McDougall*, 235 Ga. 171, 172 (219 SE2d 138) (1975). The court in this case dismissed the motion for new trial. We find nothing in the record to suggest that the trial court abused its discretion in this regard.

missed as void will toll the period for filing a notice of appeal. See, e.g., *Harrison v. Harrison*, 229 Ga. 692 (1) (194 SE2d 87) (1972) (prematurely filed motion for new trial); *Gold Kist, Inc. v. Stokes*, 135 Ga. App. 382 (2) (a) (217 SE2d 352) (1975), reversed on other grounds, 235 Ga. 643 (221 SE2d 49) (1975) (failure to attach rule nisi). In these cases, an order dismissing the motion for new trial is considered a disposition of the motion pursuant to OCGA § 5-6-38 (a), and it commences the running of the 30-day period for filing an appeal. *Heard v. State*, 274 Ga. 196 (1) (552 SE2d 818) (2001); see also *Johnson v. State*, 246 Ga. App. 239 (539 SE2d 914) (2000). Moreover, the allegations of error raised in the void motion for new trial may be reviewed on appeal. *Gold Kist*, 235 Ga. 643; *Checker Cab Co. v. Fedor*, 134 Ga. App. 28, 29 (213 SE2d 485) (1975). Hence, the appeal is properly before us and will be considered on its merits. The motion to dismiss is denied.

2. Craig contends the trial court erred by failing to enforce a settlement agreement. The undisputed evidence shows that on November 8, 2001, Holsey made a written, time-limited offer to settle the case for the policy limits of $15,000. The offer explicitly stated that Craig was required to deliver payment within five days from delivery of the letter, which was sent by facsimile on Friday, November 9, 2001, and delivered on Monday November 12, via Federal Express. It is undisputed that Craig failed to make a payment by Friday, November 16. Craig contends that on Monday, November 12, his attorney had a telephone call with one of Holsey's attorneys, in which it was agreed that the case was settled and that the deadline would not be enforced. Holsey denies that the deadline was waived. None of the associated writings indicate that the deadline was waived.

Craig moved to enforce the settlement agreement and a hearing was held. The parties submitted affidavits on the issue and argued based on the affidavits. The court did not hear live testimony. The court made clear that, based solely on the affidavits, it could not resolve who was telling the truth about the telephone conversation, and therefore it held that there was insufficient evidence to contradict the fact that the time-limited offer was not accepted by full payment within the deadline. It therefore denied Craig's motion.

"Because the trial court decided this case on motion and not by bench trial, the issues raised in this appeal are analogous to those in a motion for summary judgment. Our review is de novo." (Citations and punctuation omitted.) *Walls v. Walls*, 260 Ga. App. 673, 675 (580 SE2d 564) (2003). Compare *Griffin v. Wallace*, 260 Ga. App. 857 (581 SE2d 375) (2003) (when the trial court is called upon to act as the finder of fact regarding a motion to enforce a settlement, the clearly erroneous standard is used).

We find no error. Whether the parties agreed to waive the deadline was disputed, and therefore the trial court correctly denied the motion. *Scott v. Carter*, 239 Ga. App. 870 (521 SE2d 835) (1999), is not controlling. In that case, the existence of an agreement was established by letters between counsel for both parties, who had authority to settle, confirming that the case had been settled. Here, there were no writings confirming that the deadline had been waived.

3. Craig contends the court abused its discretion by allowing Holsey to cross-examine him regarding the details of a prior criminal conviction. Craig notes that although prior felony convictions are admissible for impeachment purposes, the evidence admitted must be limited to certified copies of the prior convictions. See

Willett v. Stookey, 256 Ga. App. 403 (568 SE2d 520) (2002). Craig does not contend that the conviction itself was inadmissible. See *Moore v. Thompson*, 255 Ga. 236, (336 SE2d 749) (1985) (evidence of defendant's prior and subsequent guilty pleas to driving under the influence admissible on question of punitive damages).

But the questioning at issue occurred during the punitive damages phase of the trial. Punitive damages are recoverable only where "it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." OCGA § 51-12-5.1 (b). During the punitive damages phase of the trial, the court may receive evidence that "is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case." OCGA § 51-12-5.1 (d) (2). The award authorized by this statute for the tortfeasor's intent, motive, or attitude as described above, "has been construed as that which is related to the tort." *Carter v. Spells*, 229 Ga. App. 441, 442 (494 SE2d 279) (1997). "It is this orientation of defendant in connection with the act at issue [that] aggravates the act's wrongfulness." Id. at 443.

But that does not mean that the question of the defendant's state of mind must be examined "solely by focusing on the incident in issue." *Moore*, 255 Ga. at 237. And the general rule still holds: "trial judges may exercise discretion in excluding relevant evidence if its probative value is substantially outweighed by the risk that its admission will confuse the issue, mislead the jury, or create substantial danger of undue prejudice." *Webster v. Boyett*, 269 Ga. 191, 195 (496 SE2d 459) (1998).

Craig contends that the court should not have allowed cross-examination into the details of his prior criminal conviction and probation for possession of a controlled substance, specifically, the fact that the controlled substance was crack cocaine intended for his personal use. But the evidence offered was relevant to the issue of whether on the day of the accident, Craig's actions showed willful misconduct, wantonness, or that entire want of care that would raise the presumption of conscious indifference to consequences.

The evidence was introduced together with other evidence regarding Craig's past drug use such as: that Craig violated the terms of his probation by drinking and using drugs on the day of the accident; that he smoked marijuana that day because he "just felt like it"; that he often smoked marijuana while he was on probation; that he sometimes drove a car after smoking marijuana; and that he has continued to smoke marijuana since the accident. The evidence taken as a whole suggests that Craig was disposed to willfully violate the law and the terms of his probation by using illegal drugs, that he consciously drove under the influence of drugs, and that he did not even change this wanton conduct after the accident.[2] See *Langlois v. Wolford*, 246 Ga. App. 209, 214 (2) (d) (539 SE2d 565) (2000) (prior similar acts of drunk driving and intoxication are relevant and material as evidence of aggravated conduct for punitive damages). We find no abuse of discretion in the trial court's decision to allow the evidence.

4. Craig also contends that the court abused its discretion when it allowed testimony during the first phase

---

[2] "[W]anton conduct is that which is so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent." *Muller v. English*, 221 Ga. App. 672, 676 (2) (c) (472 SE2d 448) (1996).

of the trial that he used marijuana on occasion subsequent to the accident and that he was an "occasional" pot smoker. The court allowed cross-examination for the purpose of showing that Craig violated his probation. As shown above, Craig admitted in the punitive damages phase of the trial that he sometimes drove under the influence of drugs.

In opening argument, Craig's attorney said,

> I guess, as far as, you know, whether or not to punish him, or to award money damages against him to keep him from doing this in the future, I think it's important to note that this thing happened back in 1998, you know, Mr. Craig's not had any further DUI's, *or any incidents like this,* and so. . . apparently the plea helped *to deter him from future acts such as this,* and I think that should be considered by you, in determining whether or not he needs to be punished or deterred further.

(Emphasis supplied.) Given this opening, we cannot say that the trial court abused its discretion by allowing the testimony. The comments opened the door for evidence that Craig had not been deterred by his criminal conviction from smoking marijuana and driving after doing so. See *Thomas v. State,* 247 Ga. App. 798, 799 (1) (545 SE2d 354) (2001) (one cannot complain of a ruling when one's own conduct aided in causing the ruling).

5. Finally, Craig contends the award of punitive damages was grossly excessive so as to be unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. We review such claims de novo. *Time Warner Entertainment Co. v. Six Flags Over Georgia,* 254 Ga. App. 598 (563 SE2d 178) (2002). The determination is based on three guideposts:

(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm Mut. Auto. Ins. Co. v. Campbell,* ___ U.S. ___ (II) (123 SC 1513, 155 LE2d 585) (2003). "Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." (Citations and punctuation omitted.) Id.

(a) The most important indicium of the reasonableness of a punitive damage award—the degree of reprehensibility of the defendant's conduct—requires that we consider whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." Id. at ___ (III); *BMW of North America v. Gore,* 517 U.S. 559, 575 n. 23 (116 SC 1589, 134 LE2d 809) (1996) ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.")

Of these five factors, three are present here: (1) Craig caused physical harm; (2) he acted in reckless disregard of the safety of others by driving after drinking and using drugs and by fleeing the scene; and (3) he has driven repeatedly after drinking or smoking marijuana. Adding to Craig's reckless disregard is the fact that he admitted that he was aware of the deleterious combined effect of drinking and smoking marijuana on one's ability to drive, that he did so anyway just because he felt

like it, and that his drinking and drug use was a violation of probation. Although there is no evidence that Craig acted with malice or with knowledge of any vulnerability of Holsey's,[3] Craig's conduct exhibited a high degree of reprehensibility.

(b) The second guidepost is the disparity between the actual *or potential harm* suffered by the plaintiff and the punitive damages award. *Gore*, 517 U. S. at 580. Here, Holsey could have died as a result of Craig's driving under the influence. Thus, the potential harm was much greater than the actual. See *Hospital Auth. of Gwinnett Co. v. Jones*, 261 Ga. 613, 615 (1) (409 SE2d 501) (1991) (punitive damages award consistent with potential ensuing injuries). In Georgia, awards for wrongful death can easily approach or exceed the amount of punitive damages awarded in the present case. See, e.g., *Stewart v. Medical Center of Central Georgia*, 239 Ga. App. 90 (520 SE2d 747) (1999) (jury awarded $127,679.73 for wrongful death); *Williams v. Worsley*, 235 Ga. App. 806 (510 SE2d 46) (1998) (a jury awarded $750,000 for full value of life); *Hospital Authority of Hall County v. Adams*, 110 Ga. App. 848 (140 SE2d 139) (1964) ($115,000 award for wrongful death of 47-year-old). Accordingly, we find no disparity between the potential harm suffered by Holsey and the $200,000 punitive damage award.

---

[3] One court has reasoned, "[t]he court in *Campbell* and *Gore* stated the third reprehensibility subfactor in terms of *financial* vulnerability, but that characterization undoubtedly reflects the origins of those opinions in torts of an essentially economic nature. In other cases, such as this one, it makes sense to ask whether and to what extent the defendant took advantage of a known vulnerability on the part of the victim to the conduct triggering the award of punitive damages, or to the resulting harm." *Henley v. Philip Morris*, 5 Cal.Rptr.3d 42, 82 (Cal. App. 2003).

(c) The third guidepost is "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.' [Cit.]" *State Farm,* ___ U.S. at ___ (II) (123 SC at 1526). But Georgia law provides for only modest civil penalties for Craig's three specific crimes.[4] We find this guidepost less important than the first two based on the nature of Craig's reprehensible conduct.

Furthermore, the guideposts are based on the principle "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore,* 517 U. S. at 574 (III). OCGA § 51-12-5.1 itself informs the public that the $250,000 cap on punitive damages in this state does not apply to torts where the defendant acted or failed to act while under the influence of alcohol, drugs, or other judgment altering substances. OCGA § 51-12-5.1 (f). This legislation informs the public that this type of conduct is subject to large penalties.

In summary, the award of punitive damages in this case was not grossly excessive so as to be unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Judgment affirmed. Johnson, P. J., Blackburn, P. J., Eldridge, Barnes, and Mikell, JJ., concur. Andrews, P. J, concurs in part and dissents in part.

---

[4] The penalty for a first offense of leaving the scene of an accident involving injury is a fine that cannot exceed $1,000. OCGA § 40-6-270 (a). The penalty for a first offense of driving under the influence is the same. OCGA § 40-6-391 (C) (1) (a).

A03A1644. CRAIG v. HOLSEY

ANDREWS, Presiding Judge, concurring in part and dissenting in part.

Because I believe the punitive damages awarded in this case were excessive, I respectfully dissent.

"Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mutual Auto. Insurance Co. v. Campbell*, — U.S. —, 123 SC 1513, 1519-1520, 155 LE2d 585 (2003) (citations and punctuation omitted).

As stated by the majority, courts reviewing punitive damage awards are to consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Id.

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Id. at 1521. In determining the reprehensibility of the defendant's actions, courts must consider whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." Id.

In the instant case, only the first two of these five factors were present. There was no evidence that the victim was financially vulnerable. In addition, this was an isolated incident, Craig had no previous arrests for DUI. And, the harm was the result of an accident, not intentional malice, trickery or deceit.

Looking at the second *Gore* guidepost, we note that the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." Id. at 1524. The Court has stated, however, that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." Id.

In this case, compensatory damages were $8,801 and the punitive damages were $200,000; thus, the punitive damages awarded were over 22 times the amount of compensatory damages.

Moreover, the majority seeks to negate the disparity between the two awards by leaping to the conclusion that Holsey could have died in this accident and cites to compensatory damages in *wrongful death* cases as analogous to the potential damages in this case. Although driving under the influence of alcohol and drugs is always dangerous and there is always a chance that a traffic accident can be fatal, this analogy is not helpful and the majority cites to no authority on point which would support this assumption. The only authority cited is *Hospital Auth. v. Jones,* 261 Ga. 613 (409 SE2d 501) (1991), which was decided before the recent United States Supreme Court holdings and specifically rejects "the notion that punitive damages must necessarily bear

some relationship to the *actual* damages awarded by the jury." Id. at 614.

In the case before us, the evidence was that there were two people in the car that Craig hit from behind. There was no evidence at trial that the driver suffered any injuries and Holsey, the passenger, had back and neck strain which appeared to have resolved itself at the time of trial. This was not a potentially fatal accident nor is it a potential wrongful death case.

As to the third factor, the disparity between the punitive damages and any penalties provided for in comparable cases, the majority acknowledges that there is a great disparity here and therefore, the third guidepost's requirement is not met.

When an appellant brings a due process claim under the Fourteenth Amendment, this Court is required to conduct a *de novo* review of the punitive damages awarded and reverse an award "imposed indiscriminately" which constitutes an "arbitrary deprivation of property." *State Farm,* supra at 1520. In this case, of the three guideposts set out by *Gore,* the last two are not met, and only two of the five factors to be considered are present in the first one. Accordingly, the punitive damages awarded in this case were excessive and the judgment should be reversed.

No. 03-1701

Supreme Court, U.S.
FILED
JUL 23 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RODNEY LEROY CRAIG,

Petitioner,

v.

TAMIKA HOLSEY,

Respondent.

On Petition For Writ Of *Certiorari* To The Georgia Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

CHARLES A. MATHIS, JR.
Counsel of Record
THE MATHIS FIRM, P.C.
100 Peachtree St., NE – Suite 1400
Atlanta, GA 30303
(404) 523-5000

DAVID N. KRUGLER
CASH, KRUGLER & FREDERICKS, LLC
The Candler Building – Suite 1330
127 Peachtree St., NE
Atlanta, GA 30303
(404) 659-1710
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Introduction	1
Standards	2
Statement of the Underlying Case	2
Defendant's Appeal	5
Evidentiary Issues	6
The *Gore* Guideposts	8
Defendant's Egregious & Reprehensible Conduct	9
Relationship Between Actual & Potential Harm and the Punitive Damage Award	12
Relationship Between the Punitive Damage Award and Comparable Civil and Criminal Penalties	14
The Court of Appeals' Reliance on *Jones*	16
The Purported Conflict Between the Utah & Georgia Supreme Court Decisions	18
Conclusion	19

TABLE OF AUTHORITIES

Page

CASES:

BMW of North America v. Gore, 517 U.S. 559 (1996).....*passim*

Bolsta v. Johnson, No. 2003-004, 2004 WL 444649 (Vt. March 4, 2004)..... 19

Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2004 WL 869188 (Utah Apr. 23, 2004)..... 18

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 523 U.S. 424 (2001)..... 2

Craig v. Holsey, 590 S.E.2d 74 (Ga. App. 2003).....*passim*

Holt v. Grinnell, 441 S.E.2d 874 (Ga. App. 1994)..... 7

Hospital Auth. Of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991)..... 17

Kent v. White, 599 S.E.2d 731 (Ga. App. 2002)..... 10

Langlois v. Walford, 539 S.E.2d 565 (Ga. App. 2000)..... 7

Martin v. Williams, 451 S.E.2d 822 (Ga. App. 1994)..... 7

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003).....*passim*

Thomas v. State, 545 S.E.2d 354 (Ga. App. 2001)..... 8

Webster v. Boyett, 496 S.E.2d 459 (Ga. 1998)..... 3

CONSTITUTION, STATUTES & REGULATIONS:

Ga. Code Ann. § 40-6-270..... 16

Ga. Code Ann. § 40-6-391..... 16

Ga. Code Ann. § 51-12-5.1..... 3, 4, 10, 13, 15

INTRODUCTION

This is a drunk driving, auto accident case. Petitioner Rodney Leroy Craig (hereinafter "defendant Craig") was intoxicated, high on drugs and on probation for possession of crack cocaine at the time he crashed his car into plaintiff Tamika Holsey in the summer of 1998. He fled the scene after the crash without any regard for plaintiff but was subsequently arrested and pled guilty to various criminal charges. On the stand at the trial of this case, defendant Craig admitted that his conduct was "reckless" and during closing argument Craig's attorney admitted to the jury that his client's conduct was "reprehensible and inexcusable." (T. 92-93, 341). The jury rendered a verdict in favor of plaintiff which included a $200,000.00 punitive damage award.

Defendant appealed the punitive damage award asserting it violated his due process rights under the Fourteenth Amendment. The Georgia Court of Appeals analyzed the issue under *BMW of North America v. Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and upheld the award by a vote of 6 to 1. *See Craig v. Holsey*, 590 S.E.2d 74 (Ga. App. 2003) (attached to Petition). After defendant's discretionary appeal to the Georgia Supreme Court was denied he filed a Petition for *Certiorari* with this Court.

No compelling reason exists for granting a writ of *certiorari* in this case.

STANDARDS

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10 (2003). Compelling reasons include cases where (1) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort; (2) a state court has decided an important question of federal law that has not been, but should be, settled by this Court; or (3) a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. *Id.*

While this Court must conduct a *de novo* review of the amount of a punitive damage award pursuant to the factors articulated in *Gore*, "it of course remains true that [appellate courts] should defer to the [trial court's] findings of fact unless they are clearly erroneous." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 440 n.15 (2001).

STATEMENT OF THE UNDERLYING CASE

On August 9, 1998, defendant Rodney Leroy Craig smoked two marijuana cigarettes, drank six beers and eight ounces of gin, and then crashed his car into Tamika Holsey. (Craig Depo. at 53-54; T. at 69, 72-74, 175). After the car in which Tamika was a passenger spun across the highway into an oncoming lane of traffic, Craig fled the scene. (T. at 84-85, 177). He never stopped to determine whether anyone had been injured or killed, and was only captured by law enforcement because his car died as a result of the violent collision. (T. 86-88). After his arrest,

Craig's blood-alcohol level was 0.169. (Craig Depo. at 98; T. at 368). Tamika, a young college basketball player, sustained serious injuries as a result of the accident. (T. at 180-81).

Plaintiff filed suit against Craig seeking compensatory and punitive damages under Georgia law, trials involving punitive damage claims are bifurcated. Ga. Code Ann. § 51-12-5.1(d); *Webster v. Boyett*, 496 S.E.2d 459 (Ga. 1998). During the first phase of trial, the jury determines whether punitive damages should be awarded and during the second phase the jury determines the amount of punitive damages necessary to punish and deter the defendant from future misconduct. *Id.*

During the first phase of trial, the evidence showed that Craig's misconduct was willful, intentional, reckless and that he acted with a total disregard for the consequences of his actions or the health and safety of others. Based upon his prior experiences, defendant Craig admitted he was aware at the time of the subject incident of the "speedball" effect of combining alcohol and drugs, and the influence it had on his ability to drive. (T. 333-37). Craig was a habitual substance user who often drove his vehicle after consuming both alcohol and drugs, and thus had an appreciation of the risks and dangers of engaging in such conduct. (T. 334). Despite this, Craig knowingly operated his vehicle on the night in question while drunk and on drugs. Craig testified that the reason he engaged in such misconduct was that the "mood" just hit him. (T. 334-35).

This testimony was admitted during the first phase of trial as evidence that Craig engaged in willful misconduct, recklessly disregarded a known risk and was consciously indifferent to the consequences of his actions. *See* Ga. Code

Ann. § 51-12-5.1(b). This evidence was also admissible because defendant's attorney opened the door during opening argument as follows:

> I guess, as far as, you know, whether or not to punish him, or to award money damages award against him to keep him from doing this in the future, I think it's important to note that this thing happened back in 1998, you know, Mr. Craig's not had any further DUI's, *or any incidents like this*, and so, the deterrence factor, certainly, I would hope that the punishment handed down by, you know, the state of Georgia, that apparently the plea helped *to deter him from future acts such as this*, and I think that should be considered by you, in determining whether or not he needs to be punished or deterred further.

(T. at 58) (emphasis added).

While defendant's counsel argued that Mr. Craig had been adequately deterred by the imposition of criminal sanctions by the state of Georgia, the evidence was quite to the contrary. Craig continued to engage in similar misconduct and admitted violating the terms of the punishment imposed after the incident in which Ms. Holsey was injured. (T. 90-92). As the Georgia Court of Appeals held, defense counsel's opening argument "opened the door for evidence that Craig had not been deterred by his criminal conviction from smoking marijuana and driving after doing so." *Craig v. Holsey*, at 8a.

Evidence was also introduced during the first phase that Craig had pled guilty to possession of crack cocaine and was on probation which forbade him from drinking alcohol or consuming drugs at the time of the collision. (T. at 75, 90, 361-62). Under Georgia law, evidence of felony convictions

and guilty pleas are admissible for purposes of impeaching a witness, which was done in this case. As the Court of Appeals noted below, Craig did "not contend that the conviction itself was inadmissible" on appeal. *Craig v. Holsey*, at 6a.

Craig exhibited a total disregard for the law and for the safety of others, including Tamika Holsey. His conduct went beyond the bounds of all acceptable behavior in a civilized society and threatened the health and lives of those in his path. Based upon the evidence, the jury returned a verdict for plaintiff awarding $8,801.40 in compensatory damages and determined that punitive damages should be awarded against Craig.

During the second phase of trial, the jury received evidence of the need to punish and deter Craig from engaging in similar intentional and potentially lethal misconduct in the future. Evidence was submitted during this phase of Craig's pattern of reckless, illegal and dangerous alcohol and drug-related behavior. The jury awarded $200,000.00 in punitive damages. (R. at 219).

DEFENDANT'S APPEALS

Defendant Craig appealed the jury's verdict to the Georgia Court of Appeals. Craig argued that certain evidence should not have been admitted at trial and that the punitive damage award unconstitutionally deprived him of due process under the Fourteenth Amendment. The court affirmed in all respects.

Regarding the evidentiary issues, the court held that all of the testimony and evidence was admissible for

purposes of establishing plaintiff's entitlement to punitive damages and as to the amount of punitive damages. The court further held, as noted above, that defendant's counsel opened the door with respect to the admission of certain testimony.

As to defendant's due process claim, the court went through the analysis set forth in this Court's decisions in *Gore* and *Campbell* and held that "the award of punitive damages in this case was not grossly excessive so as to be unconstitutional under the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Craig v. Holsey*, 8a-11a. Defendant's primary argument was that the punitive damage award was *per se* unconstitutional because of its ratio to the compensatory damage award, a position explicitly rejected by this Court. *Campbell*, 538 U.S. at 425.

For the reasons set forth below, the Georgia Court of Appeals' analysis was proper under *Gore* and *Campbell*.

EVIDENTIARY ISSUES

Much of defendant's Petition is based upon purported erroneous evidentiary rulings by the trial court. To the extent defendant Craig seeks to have this Court review these evidentiary rulings, respondent suggests that such a review is unnecessary and would be inappropriate. The discretionary evidentiary rulings of the trial court were proper and correct.

> "Admission of evidence is within the sound discretion of the trial court and appellate courts will not interfere absent abuse of that discretion. Evidence having a tendency to establish facts in

> issue is relevant and admissible, and no matter how slight the probative value, our law favors admission of relevant evidence. [Cit.]" *Martin v. Williams*, 451 S.E.2d 822, 824 (Ga. App. 1994).
>
> "It is a general rule that in a suit for negligence, evidence of the defendant's similar acts or omissions on other and different occasions is not admissible. Generally, proof of the defendant's prior driving record, or of his general character for carelessness or recklessness is impermissible. However, an exception to the general rule applies where the defendant's driving under the influence in the incident at issue is an aggravating circumstance which would authorize the trier of fact to impose punitive damages. . . . Under those circumstances . . . the extent of the defendant's willful misconduct, wantonness and entire want of care in driving under the influence cannot be gauged solely by focusing on the incident in issue. [Cit.] Accordingly, in such cases, evidence that the defendant pled guilty to driving under the influence prior to or even after the incident in issue would be admissible as relevant to the issue of punitive damages." *Holt v. Grinnell*, 441 S.E.2d 874, 875 (Ga. App. 1994). *See also Langlois v. Walford*, 539 S.E.2d 565 (Ga. App. 2000).

Evidence regarding Craig's prior experiences with combining alcohol and drugs, and with driving, were admissible for purposes of establishing Craig's awareness of the "speedball" effect of combining the two and aware of the influence it had on his ability to drive. (T. 333-37). The evidence related directly to the degree of recklessness, willfulness and reprehensibility of his conduct on the night plaintiff was injured.

Evidence regarding Craig's subsequent drug use was introduced as evidence that the criminal sanctions imposed against him had no deterrent effect on his behavior. As stated above, the Georgia Court of Appeals held that defendant's counsel opened the door on this issue. "[O]ne cannot complain of a ruling when one's own conduct aided in causing the ruling." *Craig v. Holsey*, at 8a (citing *Thomas v. State*, 545 S.E.2d 354 (Ga. App. 2001)).

Defendant Craig was not punished for "dissimilar acts" but was punished for his misconduct in this case. The amount of the punitive award was based upon that misconduct and upon the ineffective deterrent effect of the criminal sanctions already imposed by the state of Georgia.

THE *GORE* GUIDEPOSTS

The facts of this case are extraordinary because defendant's misconduct was unique and the need for punitive damages compelling. The jury's punitive damage award was supported by the evidence and was constitutionally permissible.

Constitutional review of punitive damage awards must be based on the facts and circumstances of each case. Under *Gore*, appellate courts must consider three case-specific guideposts: (1) whether the award was commensurate with the egregious and reprehensible conduct of the defendant; (2) the relationship between the actual or potential harm caused by defendant's misconduct and the punitive damage award; and (3) the relationship between the punitive damage award and the criminal and civil

penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. 559.

The lower court correctly held that these guideposts support the jury's punitive damage award in this case.

DEFENDANT'S EGREGIOUS & REPREHENSIBLE CONDUCT

"Perhaps *the most important* indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct," as it "should reflect the enormity of his offense." *Gore*, 517 U.S. at 575 (emphasis added). "This principle reflects the accepted view that some wrongs are more blameworthy than others." *Id.* "The flagrancy of the misconduct is thought to be the *primary consideration* in determining the amount of punitive damages." *Id.* at 575 n.23 (emphasis added).

There can be no question that the reprehensibility of defendant's conduct in this case justified, and was indeed the impetus behind, the jury's punitive damage award Defendant used drugs and drank an enormous amount of alcohol before the crash; he was already on probation for a crack cocaine charge that forbade him from consuming alcohol or drugs; he fled the scene of the accident; he did so because the mood hit him; he had driven under the influence of both drugs and alcohol prior to this accident; he knew of the "speedball" effect of combining the two but continued to engage in such misconduct; he continued to use drugs after being criminally sanctioned for his conduct in this case; he admitted he acted recklessly and his counsel admitted that his conduct was "reprehensible."

This conclusion is further supported by statutes enacted by the Georgia legislature. While punitive damages in Georgia are capped in tort actions at $250,000.00

unless a specific intent to cause harm can be demonstrated, the legislature removed that cap where "the defendant acted or failed to act while under the influence of alcohol [or] drugs. . . ." Ga. Code Ann. § 51-12-5.1. "[T]he General Assembly has placed various limitations on awards of punitive damages and the recipient in recognition of the many degrees of culpability." *Kent v. White*, 599 S.E.2d 731, 738 (Ga. App. 2002).

A "reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583. While punitive damage awards are still bound by the constraints of the Fourteenth Amendment, O.C.G.A. § 51-12-5.1 reflects the "legislative judgments" requiring "substantial deference" under *Gore*.

Despite the admissions of defendant and his counsel at trial regarding the reprehensibility of his misconduct, defendant now takes the incredible position that the reprehensibility prong of the *Gore* analysis does not support the punitive damage award in this case.

In *Campbell*, the Supreme Court noted that factors to be considered in determining the reprehensibility of a defendant's misconduct include:

(1) whether the harm caused was physical as opposed to economic;

(2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

(3) whether the target of the conduct had financial vulnerability;

(4) whether the conduct involved repeated actions or was an isolated incident; and

(5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419.

In his Petition, defendant Craig insists that subfactors 3, 4 and 5 were not met, and therefore the award must be reversed. This argument is wrong. The third subfactor mentioned in *Campbell* – financial vulnerability – has no conceivable application in personal injury cases. That issue is relevant only in commercial torts, such as those in *Gore* and *Campbell*. The fourth subfactor was indisputably supported by the evidence in this case because Craig was a repeat, habitual offender and had engaged in a long history of misconduct. The Court of Appeals in this case correctly held that Craig had "driven repeatedly after drinking or smoking marijuana." The fifth subfactor is also satisfied because defendant's flagrant conduct rose to the level of intentional misconduct and/or malice. Craig admitted during his testimony that he had combined drugs and alcohol before and operated a vehicle; that he was aware of the effect this drug-alcohol combination had on his ability to drive; and that he continued to engage in such misconduct in the face of such knowledge.

Defendant Craig's argument that the Court of Appeals' decision somehow opened the flood gates for unlimited punitive damage awards in every case ignores the very unique and very important facts of this case. The reprehensibility of defendant's misconduct cannot be contested.

RELATIONSHIP BETWEEN ACTUAL & POTENTIAL HARM AND THE PUNITIVE DAMAGE AWARD

In the court below, defendant asserted that any punitive damage award exceeding nine times the compensatory award was *per se* unconstitutional under *Campbell*. Defendant Craig would transform the appellate courts into constitutional mathematicians in reviewing punitive damage awards, requiring automatic reversal or remittitur if they exceed a particular ratio.

Defendant relies upon a sentence from the Court's opinion that "in practice, few awards exceeding single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *Campbell*, 538 U.S. at 425, then argues that because the award in this case exceeds that ratio the Georgia Court of Appeals' decision violates *Gore* and *Campbell*.

This Court has explicitly rejected such a mindless calculation, demanding instead judicial assessment, thought and reasoning in reviewing such issues. Defendant's position is over-simplistic, inappropriate and contrary to the explicit language of the *Gore* and *Campbell* decisions. This Court has "consistently *rejected* the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *Id.* (emphasis added). In fact, this Court explicitly rejected the argument urged by defendant in this case by holding: "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.*

With respect to single-digit ratios, the Court emphasized that the reference was merely "instructive" and in no

way "binding" in all cases. *Id.* Significantly, the Court held:

> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld *may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages.*

Id. (emphasis added).

This case falls into the very category identified by the Court that would justify an award in excess of the single-digit ratio: the defendant engaged in a "particularly egregious act" that resulted in a comparatively small amount of economic damages. The jury determined that substantial punitive damages were warranted and required to punish and deter the defendant from future misconduct. That is exactly what the jury was charged, as punitive damages under Georgia law are to be "awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant." Ga. Code Ann. § 51-12-5.1(c).

The Supreme Court's decision in *Campbell* does not reduce the careful, constitutional analysis required for review of punitive damage awards to a mathematical equation; legal reasoning has not been replaced by calculators. The lesson from *Campbell* is clear, but it has been missed by the defendant: each case must be assessed on its own facts and circumstances.[1]

---

[1] The particular facts of *Campbell* are distinguishable from the facts of this case. First, the compensatory award in *Campbell* was substantial ($1,000,000). Second, *Campbell*, like *Gore*, involved

(Continued on following page)

The second *Gore* guidepost requires review not only of the relationship between the actual harm caused by the defendant, but the "potential harm" as well. *Gore*, 517 U.S. at 580; *Campbell*, 538 U.S. at 424. The potential harm caused by defendant's reckless and illegal misconduct in this case was certainly great – his alcohol and drug binge could have killed or maimed anyone unlucky enough to find themselves in his path. A car in the hands of an individual who is drunk and high on drugs is as dangerous as firing a loaded gun into a crowd. The potential harm was great and, contrary to defendant's position, such harm must be considered under the Supreme Court's decisions in *Gore* and *Campbell*.

The facts of this case justify the disparity between the actual or potential harm caused by defendant's misconduct and the punitive award.

RELATIONSHIP BETWEEN THE PUNITIVE DAMAGE AWARD AND COMPARABLE CIVIL AND CRIMINAL PENALTIES

The third *Gore* guidepost requires a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct . . . " *Gore*, 517 U.S. at 583 (emphasis added). A "reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning

---

commercial transactions, and not personal injuries. Lives were not at risk because of defendant's misconduct, only dollars. Third, the *Campbell* ratio was 145:1, which would translate in this case to a punitive damage award of $1,276,203. In *Gore*, the ratio was 500:1, an equivalent of a $4,400,700 punitive award in this case.

appropriate sanctions for the conduct at issue." *Id.* This prong also supports the jury's punitive damage award.

The civil penalties that can be imposed for defendant Craig's conduct in this case are set forth at Ga. Code Ann. § 51-12-5.1(f). As discussed above, the Georgia legislature has removed the $250,000.00 cap on punitive damages in cases where the defendant acted or failed to act while under the influence of alcohol or drugs. *Id.* In its opinion, the Georgia Court of Appeals noted that the *Gore* guideposts are "based on the principle that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Craig v. Holsey*, at 11a. The legislature's removal of the $250,000.00 punitive damage cap for DUI cases weighs heavily in favor of supporting the jury's award in this case. Defendant does not discuss the significance of this statute in his Petition.

The third *Gore* guidepost is further satisfied when the criminal penalties for defendant Craig's misconduct are considered.[2] Defendant's conduct in this case was obviously

---

[2] In *Campbell*, the Supreme Court held that "[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and *the remote possibility* of a criminal sanction does not *automatically* sustain a punitive damages award." *Campbell*, 538 U.S. at 428 (emphasis added).

These concerns have little or no application to this case, however, because Craig pled guilty to his crimes – his criminal guilt was not a "remote possibility" but a fact established at trial. The *Campbell*

(Continued on following page)

criminal, as is evidenced by the charges brought against him to which he pled guilty. While the maximum fine for leaving the scene of an accident and driving under the influence is $1,000.00 per offense, there are other sanctions authorized under Georgia's criminal statutes. Craig was subject to imprisonment for up to twelve months for causing a non-serious injury and from one to five years in prison for causing serious injury of another. Ga. Code Ann. § 4-6-270. Under Ga. Code Ann. § 40-6-391(c), Craig was subject to imprisonment for "not less than ten days nor more than 12 months." Defendant's conduct on the night of August 9, 1998, constituted violations of his probation which would also have been grounds for imprisoning him.

The fact that imprisonment is authorized in the criminal context for a defendant's misconduct is significant. *Gore,* 517 U.S. at 583. The fact that the legislature authorized up to five years imprisonment or more for defendant's conduct in this case strongly supports the jury's punitive damage award.

THE COURT OF APPEALS' RELIANCE ON *JONES*

In his Petition, defendant Craig misstates the rationale and analysis employed by the Georgia Court of Appeals by insisting that the court misapplied the law and ignored the second *Gore* guidepost. Defendant makes the following assertion:

---

decision underscores that the existence of criminal sanctions is relevant to the third *Gore* guidepost, but that it does not "automatically" sustain a punitive award.

> The only authority that the court below cited in support of its comparison of hypothetical compensatory damages to punitive damages is *Hospital Auth. Of Gwinnett County v. Jones*, 409 S.E.2d 501 (Ga. 1991). In *Jones*, the Georgia Supreme Court "rejected the notion that punitive damages must bear some relationship to the *actual* damages awarded by the jury."

Petition at p. 10-11.

Defendant's statement is inaccurate and misleading. This Court's decisions require consideration of the "potential harm" of a defendant's misconduct under the second *Gore* guidepost. *See Gore*, 517 U.S. at 575 (second guidepost of constitutional analysis of punitive damage awards under the due process clause is "the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award."); *Campbell*, 538 U.S. at 424 ("Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award . . . We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.") (internal citations and quotations omitted).

The Court of Appeals passing reference to the *Jones* decision on page 10a of its opinion was merely illustrative of this principle that the actual *and* potential harm should be considered. Contrary to defendant's representation to this Court, *Jones* was not relied upon as "[t]he only authority" for considering potential harm – *BMW v. Gore* was the cited authority. The portion of the *Jones* decision quoted by defendant above which purportedly rejected any

comparison between compensatory and punitive damages was *never* mentioned, considered nor relied upon by the Georgia Court of Appeals in this case.

Defendant's insinuation that the lower court rejected and did not apply the second *Gore* guidepost is simply wrong.

THE PURPORTED CONFLICT BETWEEN THE UTAH & GEORGIA SUPREME COURT DECISIONS

Defendant's attempt to create a conflict between the Georgia Court of Appeals' decision in this case and the Utah Supreme Court's decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 WL 869188 (Utah Apr. 23, 2004), is frivolous.

Defendant argues that the reasoning and holding of the Utah Supreme Court's recent decision, which merely cites language from *Campbell*, "demonstrates that it will likely invalidate *any* punitive award exceeding a 9-to-1 ratio." Petition at 10-11 (emphasis added). Nothing in the Utah Court's decision purports to draw *any* such bright line ratio. In fact, that court held as follows:

> In both cases, the Supreme Court resisted the impulse to draw bright lines or create categorical classifications in fixing punitive damages awards, electing instead to adopt general standards and guideposts. *Campbell II*, 538 U.S. at 425; *Gore*, 517 U.S. at 582-83. The Supreme Court has also consistently recognized punitive damages as a means to "further a State's legitimate interests in punishing unlawful conduct

> and deterring its repetition." *Gore*, 517 U.S. at 568. Taken together, these themes create a logical underpinning to an interpretation of the Supreme Court's remand order which sanctions and expects us to exercise a considerable measure of independent judgment in fixing the punitive damages award.

Even if the Utah Supreme Court *had* adopted a rule barring all punitive damage awards exceeding a 9-to-1 ratio (which it did not), such a decision would conflict directly with this Court's admonitions in *Gore* and *Campbell*. The purported conflict between the Utah and Georgia Supreme Court decisions is a mere fabrication and cannot serve as a basis for granting a writ of *certiorari* in this case.[3]

CONCLUSION

Defendant's contention that the Georgia Court of Appeals' opinion violates U.S. Supreme Court precedent is unfounded and without merit. Respondent respectfully

[3] Craig's argument regarding the Vermont Supreme Court's decision in *Bolsta v. Johnson*, No. 2003-004,2004 WL 444649 (Vt. March 4, 2004), is similarly meritless. *See* Def's Petition at 14-15. *Bolsta* involves an interpretation of Vermont's punitive damages statute which apparently requires intentional, malicious conduct to support an award of punitive damages. That has nothing to do with Georgia's punitive damage statute. The *Bolsta* decision did not involve nor address any constitutional issues, but merely involved an interpretation of Vermont's statute. Defendant's improper attempt to manufacture a conflict between state decisions in an effort to obtain a writ should be rejected.

submits that the Court of Appeals correctly applied controlling case law and the affirmation of the jury's verdict was proper.

Defendant's petition is based on purported erroneous evidentiary rulings of the trial court and the purported misapplication of the *Gore* and *Campbell* decisions. Such considerations are wrong and do not constitute compelling reason for granting a writ of *certiorari* in this case. *See* Supreme Court Rule 10. ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Accordingly, respondent submits that Rodney Leroy Craig's Petition for Writ of *Certiorari* should be denied.

This 23rd day of July, 2004.

Respectfully submitted,

THE MATHIS FIRM, P.C.

CHARLES A. MATHIS, JR.
Ga. Bar No. 477025
100 Peachtree St., NE – Suite 1400
Atlanta, GA 30303
(404) 523-5000
(404) 827-9894 fax

CASH, KRUGLER & FREDERICKS, LLC

DAVID N. KRUGLER
Ga. Bar No. 429929
The Candler Building – Suite 1330
127 Peachtree St., NE
Atlanta, GA 30303
(404) 659-1710
(404) 659-1720 fax

(2)

No. 03-1701

IN THE

Supreme Court of the United States

RODNEY LEROY CRAIG,

Petitioner,

—v.—

TAMIKA HOLSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

REPLY BRIEF IN SUPPORT OF CRAIG'S PETITION FOR A WRIT OF CERTIORARI

JAMES T. BUDD
Counsel of Record
MABRY & MCCLELLAND LLP
2200 Century Parkway, N.E.
10th Floor
Atlanta, Georgia 30345
(404) 325-4800

Counsel for Petitioner

RULE 29.6 STATEMENT

No corporation is a party to this action. Petitioner Craig is insured by Infinity Insurance Company.

TABLE OF CONTENTS

PAGE

Rule 29.6 Statement i

TABLE OF AUTHORITIES iii

THE GEORGIA COURT OF APPEALS' RULING UPHOLDING THE PUNITIVE DAMAGES AWARD DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *GORE* AND *STATE FARM* 1

A. The Punitive Damages Award is Presumptively Unconstitutional Because Of The 22.7-to-1 Ratio Of Punitive to Compensatory Damages 1

B. The Georgia Court Of Appeals' Comparison Of The Punitive Damages Award To Hypothetical Compensatory Damages, Rather Than The Plaintiff's Actual Compensatory Damages, Conflicts With *State Farm* 3

C. The Georgia Court Of Appeals' Justification Of The Punitive Damages Award By Reference To Dissimilar Conduct Conflicts With *State Farm* 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases: PAGE

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2004 WL 869188 (Utah Apr. 23, 2004) 2, 3

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, (1991) 2

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

THE GEORGIA COURT OF APPEALS' RULING UPHOLDING THE PUNITIVE DAMAGES AWARD DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *GORE* AND *STATE FARM*

A. The Punitive Damages Award Is Presumptively Unconstitutional Because Of The 22.7-to-1 Ratio Of Punitive To Compensatory Damages

This Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), makes clear that the 22.7-to-1 ratio of punitive to compensatory damages in this case is unconstitutionally excessive. Contrary to Holsey's assertion, Petitioner Craig does not argue that punitive damages awards exceeding compensatory damages by a 9-to-1 ratio are per se unconstitutional. Instead, the award in this case is unconstitutional because "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and this case is not one of the few cases necessitating a departure from the single-digit ratio benchmark set by this Court. *State Farm*, 538 U.S. at 424-425.

To attempt to overcome this vulnerability, Holsey argues that the facts of this case are "extraordinary" and that Craig's conduct was "unique." (Respondent's Brief in Opposition at p. 8). This argument is patently defective and without merit. Although all punitive damages cases arguably involve egregious conduct, Craig's act of driving under the influence was not undertaken with any ill will, sinister motive, or malice. Therefore, this case is no different from any other case involving a defendant driving under the influence and is in no way "unique" or "extraordinary" in comparison to other punitive damages cases.

If this Court were to deny Craig's Petition, and accept Holsey's argument, it would mean that any accident involving a defendant driving under the influence would be free of the due process limitations on punitive damages awards as set forth in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Such an exception is clearly incompatible with this Court's holding that "few" cases can exceed the single-digit ratio benchmark while satisfying due process and that a defendant's conduct must be "particularly egregious" in order to do so. *State Farm*, 538 U.S. at 424-425. Indeed, many cases involving driving under the influence would then constitutionally exceed the single-digit ratio benchmark if Holsey's position is accepted.

Holsey is also mistaken when she asserts that the only basis for the argument that the 22.7-to-1 ratio in this case is unconstitutionally excessive is a single sentence from this Court's opinion in *State Farm*. In fact, this Court has on multiple occasions stressed that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety" and that "[s]ingle-digit multipliers are more likely to comport with due process." *Id.* at 425; *Gore*, 517 U.S. at 581; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S.Ct. 1032 (1991).

Despite Holsey's attempt to downplay it, courts have inconsistently applied this Court's decisions on punitive damages as is illustrated by a comparison of the Court of Appeals' decision here with the Supreme Court of Utah's decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 WL 869188 (Utah Apr. 23, 2004). In *Campbell*, the Supreme Court of Utah noted that this Court "strongly implied" that single digit ratios mark the outer limits of due process. *Id.* at *9. Accordingly, the Court applied a 9-to-1 ratio between compensatory and

punitive damages and, thus, reduced the punitive damages award from $145 million to $9,018,780.75. *Id.* at ** 10, 12.

The reasoning and holding of the Utah Supreme Court demonstrates that it will likely invalidate any punitive award exceeding a 9-to-1 ratio. Conversely, the Georgia Court of Appeals has signaled that a 22.7-to-1 ratio is permissible in the State of Georgia and that a comparison of the punitive damages award with the actual compensatory damages award is unnecessary. The inconsistent application of *Gore* and *State Farm* by the appellate courts of Georgia and Utah evidences a split among state courts necessitating certiorari in this case.

In sum, the ratio in this case does not come close to the single-digit ratios that have traditionally satisfied due process. Instead, the plaintiff was awarded punitive damages that were over twenty-two times the compensatory damages awarded under circumstances that are no more egregious than any other case involving punitive damages. Thus, the court below did not ensure that the measure of punishment was both reasonable and proportionate to the amount of harm to the plaintiff and to the amount of compensatory damages as is required by *State Farm*. 538 U.S. at 425. Accordingly, Craig's Petition and plenary review should be granted.

B. The Georgia Court Of Appeals' Comparison Of The Punitive Damages Award To Hypothetical Compensatory Damages, Rather Than The Plaintiff's Actual Compensatory Damages, Conflicts With *State Farm*

As is fully set forth in Craig's Petition for a Writ of Certiorari, the court below never compared the actual compensatory damages to the punitive damages award as is required by the second *Gore* guidepost, nor did it

address this Court's recognition that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

Instead, the court below justified the punitive damages award by hypothesizing that the plaintiff could have died as a result of the accident, when in actuality Holsey sustained minor neck and back injuries that had nearly resolved prior to trial. The court then compared hypothetical wrongful death damages awards to the actual punitive damages awarded to rationalize that there was no disparity between the two awards. *Craig v. Holsey*, 590 S.E.2d 742, 748 (Ga. Ct. App. 2003); App. at 10a.

In her Brief in Opposition, Holsey concedes that the second *Gore* guidepost requires review of the actual harm caused by the defendant. (Respondent's Brief in Opposition at p. 14). Yet Holsey ignores that the court below conducted no such review and erroneously argues that certiorari is not necessary because Craig's conduct "could have killed or maimed anyone unlucky enough to find themselves in his path." (Respondent's Brief in Opposition at p. 14).

The comparison of hypothetical damages to the punitive damages award is in direct conflict with *Gore* and its progeny because the court below never applied the second *Gore* guidepost which requires a comparison of the actual harm to the plaintiff and the punitive damages award. *Gore*, 517 U.S. at 582. Just as due process does not permit courts to adjudicate the merits of hypothetical claims under the *Gore* reprehensibility guidepost, the comparison of hypothetical compensatory damages to punitive damages under the second *Gore* guidepost also violates due process. *State Farm*, 538 U.S. at 423.

The notion that hypothetical injuries and damages can be used to satisfy the second *Gore* guidepost, without any consideration of the actual harm to the plaintiff, is fundamentally flawed and erroneous. Accordingly, Craig's Petition for a Writ of certiorari should be granted to correct the Court of Appeals' misinterpretation of *Gore* and *State Farm*.

C. The Georgia Court Of Appeals' Justification Of The Punitive Damages Award By Reference To Dissimilar Conduct Conflicts With *State Farm*

Despite Holsey's statements to the contrary, Craig does not contest that his actions were blameworthy. But the degree of reprehensibility in this case was not commensurate with the punitive damages awarded and it is clear that the court below impermissibly relied upon Craig's dissimilar acts to bolster its reprehensibility analysis.

In affirming the punitive damages award, the court below relied upon evidence that Craig had smoked marijuana prior to and after the day of the accident and further considered the details surrounding Craig's arrest in 1996 and subsequent conviction for possession of a controlled substance in Arkansas.

In her Brief in Opposition, Holsey also relies heavily on dissimilar acts to support her contention that the *Gore* reprehensibility guidepost has been satisfied and that certiorari is not required. Holsey offers support for her argument that Craig's conduct was sufficiently reprehensible by stating that Craig was already on probation for a crack cocaine charge; Craig was an habitual substance user; Craig had previously driven under the influence of both drugs and alcohol prior to this accident; and Craig continued to use drugs after being criminally sanctioned for his conduct in this case. (Respondent's Brief

in Opposition at pp. 3, 9, 11). Yet, none of these accusations are related to the accident in question.

State Farm makes clear that the reliance of the Georgia Court of Appeals and Holsey on Craig's dissimilar acts on other occasions cannot support the punitive damage award. As is fully discussed in Craig's Petition, it is well-established that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *State Farm*, 538 U.S. at 422. Accordingly, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423.

It was the act of driving while under the influence on the date of the accident, not Craig's conviction for possession of a controlled substance, which injured the plaintiff. In his dissent, Presiding Judge Andrews of the Georgia Court of Appeals recognized that "this was an isolated incident" and that "Craig had no previous arrests for DUI." *Craig*, 590 S.E.2d at 749; App. at 13a (Andrews, P.J., concurring in part and dissenting in part). Just as in *State Farm*, there is scant evidence here of repeated misconduct of the sort that injured the plaintiff. *State Farm*, 538 U.S. at 423.

Furthermore, Holsey erroneously argues that because there is no cap on punitive damages in the State of Georgia when the defendant acted under the influence of alcohol or drugs, there is support for the punitive damages award. While there is no cap on punitive damages in such cases, this does not alter the fact that grossly excessive punitive damages awards are impermissible because they violate the Due Process Clause of the Fourteenth Amendment. Therefore, the issue of whether or not Georgia legislatively caps punitive dam-

ages is irrelevant because the punitive award here is unconstitutional.

CONCLUSION

Certiorari is warranted in this case because "of the three guideposts set out by *Gore*, the last two are not met, and only two of the five factors to be considered are present in the first one. Accordingly, the punitive damages awarded in this case were excessive and the judgment should be reversed." *Craig*, 590 S.E.2d at 749; App. at 14a (Andrews, P.J., concurring in part and dissenting in part). In particular, the Court of Appeals' failure to compare the actual harm to the plaintiff with the punitive damages award, as is required by *Gore*, makes it imperative that this Court grant certiorari. For these reasons, the decision of the Georgia Court of Appeals directly conflicts with this Court's decisions in *Gore* and *State Farm* and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES T. BUDD
Counsel of Record
MABRY & MCCLELLAND LLP
2200 Century Parkway, N.E.
10th Floor
Atlanta, Georgia 30345
(404) 325-4800

Counsel for Petitioner